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RE CHIN KHI MIN, EX P AMFINANCE BHD

HIGH COURT SABAH & SARAWAK, TAWAU
LINTON ALBERT J
[BANKRUPTCY PETITION NO: T29-37-2004,
BANKRUPTCY NOTICE NO: T(29)-238-2003 &
CIVIL SUMMONS NO: TSC 52-249-1998]
10 SEPTEMBER 2005

b

BANKRUPTCY: *Receiving and adjudication orders - Appeal against - Requisite sanction stipulated in s.38(1)(a) Bankruptcy Act 1967 - Whether obtained*

c

BANKRUPTCY: *Capacity of bankrupt - Appeal, capacity to lodge - Requisite sanction stipulated in s. 38(1)(a) Bankruptcy Act 1967 - Whether obtained*

d

This was an appeal under O. 56 r. 1 of the Rules of the High Court 1980 by an undischarged bankrupt ('the appellant') against the decision of the senior assistant registrar ordering that a receiving order and adjudication order be made against the appellant. The judgment creditor ('respondent') raised a preliminary objection founded on s. 38(1)(a) of the Bankruptcy Act 1967.

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Held (dismissing the appeal):

[1] The appellant did not obtain the requisite sanction stipulated in s. 38(1)(a) of the Bankruptcy Act 1967 and the preliminary objection was allowed. In the circumstances, the court did not find it either useful or necessary
f to consider and determine the issues the appellant sought to raise in this appeal in respect of which the appellant had no capacity to lodge. (p 384 d)

Case(s) referred to:
Bathamani Suppiah v. Southern Finance Company Bhd [2000] 2 CLJ 650 HC
Re Khoo Kim Hock [1974] MLJ 29

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Legislation referred to:
Bankruptcy Act 1967, s. 38(1)(a)
Rules of the High Court 1980, O. 56 r. 1

Appellant in person
For the respondent - Eva Lo; M/s Wong & Shim
h *For Director General of Insolvency - Asri Asif*

Reported by Suhainah Wahiduddin

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JUDGMENT

Linton Albert J:

This was an appeal under O. 56 r. 1 of the RHC 1980 by an undischarged bankrupt (the appellant) against the decision of the senior assistant registrar given on 26 August 2004 ordering that a receiving order and adjudication order be made against the appellant. The appeal was dismissed and I now give the reasons therefor.

Learned counsel for the judgment creditor (the respondent) raised a preliminary objection founded on s. 38(1)(a) of the Bankruptcy Act 1967 which provides:

> Where a bankrupt has not obtained his discharge – the bankrupt shall be incompetent to maintain any action (other than an action for damages in respect of an injury to his person) without the previous sanction of the Official Assignee.

The appellant responded by citing *Re Khoo Kim Hock* [1974] MLJ 29 where it was held that:

> section 38(1)(a) does not apply to an application under sections 92(1) and 105(1) of the Bankruptcy Act, where a bankrupt is seeking the court's discretion to review, rescind or vary any order made by it, and as such no previous sanction of the Official Assignee is necessary in the present case.

Sections 92(1) and 105(1) of the Bankruptcy Act 1967 are as follows:

Sections 92(1):

> The court may review, rescind or vary any order made by it under its bankruptcy jurisdiction.

and 105(1):

> Where in the opinion of the court a debtor ought not to have been adjudged bankrupt, or where it is proved to the satisfaction of the court that the debts of the bankrupt are paid in full, ... the court may annul the adjudication.

With respect, I do not think the decision in *Re Khoo Kim Hock* is relevant to the determination of the respondent's preliminary objection and I can do no better than to reproduce the relevant passages of the judgment of PS Gill (as he then was) in *Bathamani a/p Suppiah v. Southern Finance Company Bhd* [2000] 2 CLJ 650 an authority cited by learned counsel for the respondent at p 652:

a In my judgment it is trite law, that upon a person being adjudged a bankrupt all his affairs are vested with the official assignee. I am mindful of the case of *Re Khoo Kim Hock* [1974] 2 MLJ 29 which merely says that the prohibition of s. 38(1)(a) Bankruptcy Act 1967 does not exclude a bankrupt from applying for a review, rescinding, or varying the order of bankruptcy under O. 92 Rules of the High Court 1980, or s. 105(1) of the Act but the case is silent on the bankrupts b capacity to appeal, or for that matter to apply to stay proceedings, without the sanction of the official assignee. This issue was equally ventilated by my learned brother Low Hop Bing J in the case of *Re Low Kok Tuan; ex p Arab-Malaysia Merchant Bank Bhd* [1997] 4 CLJ 185. Like my brother judge I am equally of the view, that this deliberate omission by the legislature in regard to appeals or stay c in ss. 92(1) and 105(1) of the Act, would mean only one thing, that unlike provisions for review, rescinding, varying or annulling a bankruptcy order, for purposes of appeal against a bankruptcy order, sanction of the official assignee should be obtained. That being the case, I hold for the present the appellant lacks the legal capacity to lodge the appeal.

d The appellant in the instant appeal did not obtain the requisite sanction stipulated in s. 38(1)(a) of the Bankruptcy Act 1967 and the preliminary objection accordingly allowed. In the circumstances I did not find it either useful or necessary to consider and determine the issues the appellant sought to raise in this appeal in respect of which the appellant has no capacity to lodge.

e I have, for the reasons I have set out above, dismissed the appeal with costs.

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